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In The
Supreme Court of the United States

MR. JEFFREY F. JONES,

Petitioner,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

and

THE HONORABLE THOMAS J. MOYER, CHIEF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

SECOND SUPPLEMENTAL BRIEF

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SECOND SUPPLEMENTAL BRIEF

In his Petition for a Writ of Certiorari, the Petitioner, Mr. Jeffrey F. Jones, respectfully prayed for this Supreme Court of the United States to grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants. Petition for a Writ of Certiorari, at 1, 30.[1]

The Petitioner may keep this Court advised of new developments via supplemental briefs, which is why he has filed his Second Supplemental Brief. U.S. SUP. CT. R. 15(8).

REASONS FOR GRANTING THE PETITION

I. This Court's Judicial Free Speech Case of *Republican Party of Minnesota v. White* Has Created Havoc Nationwide in Regards to the Several States' Ability to Enforce their Codes of Judicial Conduct, and the Only Way to Correct this Imbalance Is to Make Clear that with Increased Judicial Speech Comes the Increased Duty for Recusal and Disqualification in Order to Protect Litigants' Due Process Rights as well as to Guard against Further Erosion of the Public's Lack of Confidence in the Judiciary (New Information) –

Since the Petitioner filed his Petition, nary a day has gone by that the continued fallout from *White* does not

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[1] The Petition was filed July 10, 2006, it was received by the Clerk of this Court on July 12th, and it was docketed on July 13th. The Petition was served on the Respondents and Underlying Defendants by Federal Express, and it was delivered to all of them on July 11th. The Petitioner notified the Respondents and Underlying Defendants of the docketing of the same, on the forms provided by the Clerk's office, by United States First-Class Mail on July 17th (the same day he received the same from the Clerk's office). On July 24th, the Petitioner filed a Supplemental Brief in regards to why the Petition is *not* moot. On August 14th, the Chief Justice of the Ohio Supreme Court filed his Waiver of his Right to Respond to the Petition. To date, the Trial Court has made no filing herein.

appear in the press, and from a recent National Law Journal article summarizing those developments, it now appears that this fallout is directly related to the pro-life/anti-abortion activists' attack on judicial independence, presumably in payback for *Roe v. Wade* and its progeny, which is illuminating. Marcia Coyle, *Judicial Surveys Vex the Bench*, NAT'L L.J., Sept. 4, 2006, at 1;[2] *see also* Terry Carter, *Loaded Questionnaires?*, A.B.A. J. E-REPORT, Sept. 8, 2006 (Vol. 5, Issue 36) (reporting on the Florida questionnaire experience, with links to the Florida Family Planning Council's 2006 Statewide Judicial Candidate Questionnaire as well as to the National Center for State Courts National Ad Hoc Advisory Committee on Judicial Campaign Oversight's Advice Letter, dated Aug. 28, 2006).[3]

This Court should make no mistake about it: The *White* tsunami is sweeping this country, with federal courts lining up to declare any part of the plenary codes of judicial conduct unconstitutional under the First Amendment, when *White* was incorrectly decided under an unnecessary strict scrutiny analysis.[4] Judges are not politicians,[5] they cannot be lobbied, they cannot pledge themselves to a specific outcome, etc., and just like lawyers, they are entitled to no more than commercial free speech protection under the First Amendment.[6] *Cf.* Jeffrey

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[2] This article is reprinted *infra* App. 1.

[3] This second article is available at www.abanet.org/journal/ereport/s8canon.html, and it is reprinted *infra* App. 7.

[4] *See* Petition for a Writ of Certiorari, at 12-16; *see also* Background Paper of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (discussing ABA activities in judicial ethics, activities in the states in response to *White*, and the current ABA project), available at www.abanet.org/judicialethics/about/background.html.

[5] *See* Jack Stith, *President's Perspective: Let's Talk the Right Talk About our Courts*, OHIO LAW., Sept.-Oct. 2006, at 1 ("84% of Americans polled feel we need strong courts that are free from political influence." (citation omitted)).

[6] In regards to lawyers:

> For 30 years, the courts have embraced the principle that legal advertising or solicitation is a form of commercial speech that is entitled to protection under the First Amendment.

(Continued on following page)

M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 1-3 (1988) (discussing unique role of a judge).

This Court cannot ignore the threat of financial contributions and political pressure to judicial independence, without which, there is no real separation of powers under our tripartite system of government. *See* Interview by Bill Moyers with Justices Kennedy & Breyer on *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999).[7] According to Justice Kennedy, "If an attorney gives money to a judge with the expectation that the judge will rule in his interest or his client's interest, that is corrosive of our institutions. That is corrosive of judicial independence." *Id.* According to Justice Breyer, "Judicial independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts . . . [which] do not include deciding according to campaign contributions." *Id.*; *see* ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (2003) (disqualification for campaign contributions);[8] *id.* at Canon 5(C)(2) Cmt.

. . .

> In *Florida Bar v. Went For It, Inc.*, [this Court] upheld [a] Florida State Bar Rule . . . , which [had] adopted a 30-day waiting period after an accident or injury before a lawyer is permitted to send an unsolicited written communication to the victim or his or her family. The rationale for upholding the rule was the "erosion of confidence in the profession that advertising of this kind engenders." [515 U.S. 618, 635 (1995).]

Gretchen M. Nelson, *Practicing Law Ethically in a Changing Technological World*, THE BRIEF 32, 33-36 (Spring 2006) (footnotes omitted) (overview of lawyer advertising in the context of direct mail solicitations, web sites, e-mail versus chat rooms, and interstate advertising).

[7] The complete television transcript is available at www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html; the transcript of just the interview with Justices Kennedy & Breyer is available at www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html, which is reprinted *infra* App. 20; and a video of the Justices' interview is available at http://media.pbs.org/ramgen/wgbh/pages/frontline/1807/justices.rm.

[8] *See* Petition for a Writ of Certiorari, at 23.

(same);[9] *cf.* Ohio State Bar Association E-Mail to Members, Dated Aug. 2, 2006 (noting that a majority of Ohioans believe contributions affect judicial decisions).[10]

As admitted to above, the attorney for the pro-life/ anti-abortion activists, James Bopp, Jr., "also believes recusal and solicitation clauses are vulnerable to First Amendment attack and he is waging those attacks in the Kansas lawsuit." Coyle, *supra*. If this Court allows *White* to

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[9] This commentary states in part as follows:

> There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. This is among the reasons that merit selection of judges is a preferable manner in which to select the judiciary. Notwithstanding that preference, Section 5C(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial office. It therefore permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. In order to guard against the possibility that conflicts of interest will arise, the candidate must instruct his or her campaign committees at the start of the campaign to solicit or accept only contributions that are reasonable and appropriate under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification as provided under Section 3E.

ABA MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) Cmt. (2003) (this language was adopted by the ABA in 1997).

[10] In Ohio:

> [O]ver 80% of our citizens believe that financial contributions (money) influence judicial decision-making. Even more alarming are national polls showing that over 30% of judges share this opinion. The result is a serious erosion of public trust and confidence in the judiciary that causes our citizens to question whether their courts can be fair and impartial.

Ohio State Bar Association E-Mail to Members, Dated Aug. 2, 2006 (reprinted *infra* App. 13).

remain the law of the land, then the substantive due process right to a fair and impartial judge must be enforced through a standardized recusal and disqualification procedure. These are two sides of the same coin of judicial independence.[11] *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 572-604 (2004) (discussing disqualification for campaign statements); *see also* ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(f) (2003).[12]

The Conference of Chief Justices is very aware of the *White* tsunami, on August 2, 2006, they adopted a Resolution to deal with it,[13] and currently they are "launching a

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[11] For instance, in *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005), an organization that publishes information about judicial candidates and their views challenged several provisions of North Dakota's canons after several candidates had refused to answer questions on questionnaires the organization circulated. The federal district court held that the state's Pledges or Promises and Commit Clauses violated the First Amendment, because they forbid the same types of speech as the Announce Clause struck down in *White*. *Id.* at 1037-42. However, the court upheld the state's recusal rules, finding that they are narrowly tailored to serve the compelling state interest in judicial impartiality. *Id.* at 1043-44.

[12] This section states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge, while a judge or a candidate* for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.

ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(f) (2003) (asterisk indicates a defined term) (this section was adopted by the ABA in 2003).

[13] Conference of Chief Justices, Policy Statements & Resolutions, Resolution 7 in Support of Action to Improve Judicial Selection and Improve Public Confidence in the Judiciary (Aug. 2, 2006), available at http://ccj.ncsc.dni.us/JudicialSelectionResolutions/resol7JudicialSelection.html, reprinted *infra* App. 15.

The Conference of Chief Justices ("CCJ") held a National Summit on Improving Judicial Selection in December of 2000, the summit materials are published in 35:4 LOYOLA L.A. L. REV. 1353 (June 2001)

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(they are also available at http://llr.lls.edu/volumes/v34-issue4/index.html), and the summit report is available at www.ncsconline.org/D_Research/CallToActionCommentary.pdf. The resulting "Call to Action, Statement of the National Summit on Improving Judicial Selection," was submitted in January of 2001, and it is published at 34:4 LOYOLA L.A. L. REV. 1353 (June 2001) (it is also available at www.ncsconline.org/WC/Publications/Res_JudSel_CallToActionPub.pdf).

The CCJ next held a National Symposium on Judicial Campaign Conduct and the First Amendment in November of 2001, and the symposium materials are published in 35:3 INDIANA L. REV. 649 (2002) (they are also available at www.in.gov/judiciary/supreme/docs/).

Most recently, the CCJ held a National Symposium on Judicial Speech, Post-*White*, in February of 2005, but the materials remain unpublished. The resulting "Call to Action, 2005," was submitted in July of 2005, but it also remains unpublished.

The 2001 Call to Action Item 19 recommended that "[s]tates should consider adoption of the 1999 amendments to the ABA Model Code of Judicial Conduct respecting judicial campaign finance, as appropriate in each jurisdiction." 34:4 LOYOLA L.A. L. REV. at 1358. The 2005 Call to Action Item 1 "urge[d] the CCJ to consider action on the December 2000 Summit's Call to Action," and Item 4 "urge[d] the CCJ to consider acting upon the 20 Recommendations adopted after the December 2000 Summit." Unpublished, at 1, 7. In regards to 2001 Call to Action Item 19, the 2005 Call to Action noted that "[o]nly Mississippi has adopted the [1999] amendments [to the ABA Model Code of Judicial Conduct]. The only other [s]tate in which adoption was even considered was Texas. The problems that surround judicial campaign finance are well known, and the challenge warrants action in all [s]tates which have judicial elections of any type." *Id.* at 13-14.

This is a departure from the CCJ's original opposition to the 1999 amendments. Specifically:

> In the [CCJ's] response to the ABA Task Force Report [that lead to the 1999 amendments], the Chief Justices stated that they supported recusal of judges in "jurisdictions where judicial candidates have knowledge of the identity of campaign contributors and the amounts of their contributions, and only to the extent that it applies to lawyers or parties who donate more to a judicial campaign than the amount permitted by law, whether established by statute or court rule."

Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 694 (2000-2001) (footnote omitted).

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campaign to remind voters of what used to be obvious: Judicial elections are different from those for other offices." Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, LEGAL TIMES, Aug. 21, 2006.[14]

At the risk of being cynical, the elected Chief Justices are incumbents, incumbents have an easier time of raising money for their reelections, because they are usually reelected, statistically, and therefore, they have little incentive to curtail campaign contributions. *E.g.*, Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 26-41 (2003); *see also* Nancy Marion, Rick Farmer & Todd Moore, *Financing Ohio Supreme Court Elections 1992–2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567, 576–77 (2005) (discussing positive effect of incumbency in Ohio Supreme Court elections).

In Ohio, there is a reason that people give to incumbents. For example, two-thirds of the Ohio Supreme Court's rulings from 1993–1998 favored major campaign contributors. T.C. Brown, CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1-A. The amount of money spent at the Ohio Supreme Court level is so great, that, according to the Chief Justice of the Ohio Supreme Court, "[i]t's not uncommon for [him] to vote on a case in which both lawyers have contributed [to him]. . . ." *Id.* This is an about face from when he was first elected in 1986 – in a campaign that cost $2.7 million versus 1980's election cost of $99,192 – and where after, he chose to recuse himself from cases involving major campaign contributors – but only after he was called out by the press. Sheila Kaplan, *Justice for Sale*, COMMON CAUSE 29, 30–31 (May/June 1987).

And at the risk of being really cynical, the biggest risk to incumbents is the *White* tsunami, which allows opponents to campaign on political issues, where before, judicial opponents had little they could say, and this explains why the CCJ has now decided to get out from behind, and jump in front of, this ongoing destruction of judicial independence. *See, e.g.*, James Layman, Note, *Judicial Campaign Speech Regulation: Integrity or Incentives?*, 19 GEO. J. LEGAL ETHICS 769, 769 (2006) ("[T]he effects of restrictions on judicial speech significantly favor incumbents over challengers. . . . "). Had the CCJ not opposed the ABA's 1999 amendments, and had they not ignored these same amendments for the past seven years, possibly, this storm may not have arisen in the first place.

[14] This article is available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1156164646626, and it is reprinted *infra* App. 17.

III. The Failure of the State of Ohio (and All Thirty-Eight Other States that Elect their Judges) to Adopt ABA Model Code of Judicial Conduct Canon 3(E)(1)(e) (1999), Which Provides for Disqualification and Recusal Related to Campaign Contributions by Parties and their Lawyers Over a Certain Threshold, or Its Failure to Adopt Any Other Like Standard, Violates the Petitioner's Fourteenth Amendment Substantive Due Process Right to a Fair and Impartial Trial Judge and Chief Justice (Clarification) –

The Petitioner was slightly incorrect: One state, Mississippi, has adopted something similar to the ABA's 1999 amendments,[15] even though Mississippi maintains that its provision is different than the ABA's, to wit: "Recusal of Judges from Lawsuits Involving Major Donors.

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[15] In 1999, the ABA amended Canon 3(C), adopting subsection 5; it amended Canon 3(E)(1), adopting subsection e; and it amended Canon 5(C)(3 & 4). *See* 1999 ABA Annual Meeting Report to the House of Delegates 123 (Report of the ABA Ad Hoc Committee on Judicial Campaign Finance (May 1999), available at www.abanet.org/cpr/adhoc599.html). In 1997, the ABA had amended the comment to Canon 5(C)(2). *See* 1997 ABA Annual Meeting Report to the House of Delegates 112 (unreported). All of these amendments related to the negative influence of campaign contributions on judicial independence. *See* ABA MODEL CODE OF JUD. CONDUCT App. B (2004) (cataloguing amendments to the 1990 Code to date).

In 2003, in response to *White*, the ABA amended the Terminology section, adding a definition for "impartiality"; it amended Canon 1's Commentary; it amended Canon 2's Commentary; it amended Canon 3(B) as well as its Commentary, and it added Canon 3(E)(1)(f); and it amended Canon 5(A)(3). *See* 2003 ABA Annual Meeting Report to the House of Delegates 105B, available at www.abanet.org/leadership/2003/journal/105b.pdf. However, it is hardly clear that these amendments will survive strict scrutiny analysis under *White*. *See* Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1095-1107 (2004) (noting that the ABA's concurrent attempt to relax judicial speech restrictions but increase judicial disqualification for that speech may not pass strict scrutiny analysis).

A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal." MISS. CODE JUD. CONDUCT Canon 3(E)(2).[16]

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[16] The Commentary to this Section states as follows:

> Section 3(E)(2) recognizes that political donations may but do not necessarily raise concerns about a judge's impartiality. The filing, consideration and appellate review of motions for recusal based on such donations are subject to rules governing all recusal motions. For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a). This provision does not appear in the ABA Model Code of Judicial Conduct; however, see Section 3(E)(1)(e) of the ABA model.

MISS. CODE JUD. CONDUCT Canon 3(E)(2) (Commentary) (citations corrected).

> "Major donor," for the purposes of Section 3(E)(2), shall be defined as follows:
>
> (a) If the donor is an individual, "donor" means that individual, the individual's spouse, or the individual's or the individual's spouse's child, mother, father, grandmother, grandfather, grandchild, employee and employee's spouse.
>
> (b) If the donor is an entity other than an individual, "donor" means the entity, its employees, officers, directors, shareholders, partners[,] members, and contributors and the spouse of any of them.
>
> (c) A "major donor" is a donor who or which has, in the judge's most recent election campaign, made a contribution to the judge's campaign of (a) more than $2,000 if the judge is a justice of the Supreme Court or judge of the Court of Appeals, or (b) more than $1,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals.
>
> (d) The term "contribution to the judge's campaign" shall be the total of all contributions to a judge's campaign and shall be deemed to include all contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether

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CONCLUSION

In conclusion, and for the foregoing reasons, this Supreme Court of the United States should GRANT the Petitioner, Mr. Jeffrey F. Jones, a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants.

Respectfully submitted,

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[dated: 9/19/06]

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donated directly to the judge's campaign or donated to any other person or entity for the purpose of supporting the judge's campaign and/or opposing the campaign of the judge's opponent(s). The term "contribution to a judge's campaign" shall also be deemed to include any publication, advertisement or other release of information, or payment therefore, other than a bona fide news item published by existing news media, which contains favorable information about the judge or which contains unfavorable information about the judge's opponent(s).

In defining "members of the candidate's family" and "members of the judge's family" siblings of the candidate and judge are included. The phrase "major donor" is also included. Likewise, no reference is made to retention elections. In these respects, this section differs from the ABA Model Code of Judicial Conduct.

MISS. CODE JUD. CONDUCT (Terminology & Commentary) (citation and grammar corrected).

For a discussion of the history of these amendments, *see* Miss. Admin. Office of Courts, *Supreme Court Adopts Code of Judicial Conduct and Revises Rule of Attorney Discipline* (Apr. 4, 2002), available at www.mssc.state.ms.us/news/04.04.02codex.htm.

Marcia Coyle, *Judicial Surveys Vex the Bench*
NAT'L L.J., Sept. 4, 2006, at 1

When Tennessee Court of Criminal Appeals Judge John Everett Williams, who was up for retention election this year, got his questionnaire from the Tennessee Family Action Council soliciting his views on abortion, the death penalty, same-sex marriage, evolution and other issues, he declined to respond, citing Chief Justice John G. Roberts Jr. as setting "the gold standard" on ethical conduct during his U.S. Supreme Court confirmation hearings.

"As did Justice Roberts, I do not wish to hint or signal that I am predisposed to rule on any matter that may come before me as a judge," wrote Williams in June, one of 64 Tennessee judges receiving the questionnaire.

Questionnaires for judicial candidates have been an "issue" since at least 2000, according to court and election officials, because they raise concerns about sitting judges and judicial candidates campaigning and making promises just as other political candidates do.

But this year, the questionnaires are proliferating, more sophisticated and seemingly coordinated across states.

"My impression is there are more questionnaires and most are coming from what would be considered religious right groups and they are being vetted by the same folks working with each other," said Cynthia Gray, director of the Center for Judicial Ethics at the American Judicature Society. "I'm not suggesting that's a bad thing."

She said that there is probably a "reluctant consensus" that judicial candidates have a First Amendment right to respond to these questions. "However, there are also a lot of people, including incumbent judges and

judicial candidates, who don't necessarily think it's a good idea."

Concerns about the questionnaires have reached the National Center for State Courts whose National Ad Hoc Advisory Committee on Judicial Campaign Oversight is preparing to send a letter to state courts, state bar associations and others with recommendations on how to deal with them.

Noting there is "no simple right answer" on how to respond, the advisory committee makes five recommendations:

- Don't be rushed into deciding how to handle the questionnaire: The committee says questionnaires often come just a few days before the "due" date for response.
- Never use the preprinted answers on the questionnaire: Simplifying a legal or political issue to a yes/no answer is "inconsistent" with a judge's role, and there's no legal obligation to discuss any issue, according to the committee.
- Consider responding with a letter that educates voters on the role of judges.
- Distinguish general interest, nonadvocacy groups from special interest advocacy groups and be consistent in dealing with their questionnaires.
- And never use a judicial canon of ethics to justify a decision not to respond.

That last recommendation is necessary because the result of citing a judicial canon as the reason for no response is a lawsuit, said committee member Roy Schotland of Georgetown University Law Center.

Schotland noted that questionnaires sent to judicial candidates in Tennessee, Kansas and Georgia contain

almost identical footnotes to the "decline to respond" option.

The footnote states that that particular response indicates that the candidate would answer the question but for canons of conduct prohibiting pledges and promises, or statements that commit the candidate to positions on issues that may come before the court.

If a judicial candidate does cite those canons, it's a "pretty fair bet" the state and/or its judicial ethics commission will be sued, agreed Gray. Within weeks of issuing an advisory opinion counseling against answering questionnaires, Gray said, Kansas was sued. And there have been similar suits against Indiana, Alaska, Kentucky, Pennsylvania, Florida and North Dakota, she said.

Gunning for canons

The lawyer behind most of those suits is James Bopp Jr. of Bopp, Coleson & Bostrom of Terre Haute, Ind., general counsel to the National Right to Life Committee and the victorious attorney in *Republican Party of Minnesota v. White*, 536 U.S. 762 (2002).

In *White*, the U.S. Supreme Court held that the so-called "announce clause" of the Minnesota judicial code, which prohibited judicial candidates from stating their views on legal issues within the province of the court for which they were running, violated the First Amendment.

Bopp confirms that he and his clients, relying on *White*, have been filing suits based on judges' responses that they can't answer the questionnaires because of judicial canons. And they have been remarkably successful.

"We've challenged a number of canons," he said, including those prohibiting judges from making campaign pledges and promises, and those prohibiting judges from committing themselves to certain positions once they are on the bench.

"The regulators and/or the courts in interpreting these clauses were prohibiting judges from announcing their views. My view is that's just cut and dry. The Supreme Court said you can announce your views and they can't prohibit it through some other clause."

Bopp also believes recusal and solicitation clauses are vulnerable to First Amendment attack and he is waging those attacks in the Kansas lawsuit.

A federal trial judge recently issued a temporary injunction in the Kansas suit after finding that the plaintiffs are substantially likely to succeed on the merits of their claim that the pledge and promise and commit clauses unconstitutionally chill a substantial amount of protected speech.

The court also found that that plaintiffs are substantially likely to show that the clause barring solicitation of campaign funds is underinclusive and fails to address problems of partiality that are inherent in a system of judicial elections. However, the court rejected the plaintiffs' challenge to the recusal canon.

Recusal should not be required, said Bopp, where a judge has expressed a view on an issue but says he or she can keep an open mind. And solicitation clauses should not be used to bar a judicial candidate from seeking signatures on a nomination petition, he added.

Foot in door

On the opposite side of Bopp in the Kansas and Indiana lawsuits is George T. Patton Jr. of the Washington office of Indianapolis' Bose, McKinney & Evans.

The Kansas case is now pending appeal of the injunction in the 10th U.S. Circuit Court of Appeals. *Kansas Judicial Watch v. Stout*, No. 06-3290.

In Pennsylvania, a federal district judge dismissed the challenge to the pledge and promise and commit clauses after finding that the plaintiffs had no standing. That case is pending appeal in the 3d Circuit. *Pennsylvania Family Institute v. Black*, No. 05-5259.

And a suit in which Bopp successfully challenged those clauses in the Alaskan code of judicial conduct is pending appeal in the 9th Circuit. *Alaska Right to Life PAC v. Feldman*, Nos. 05-35902, 05-36027.

Patton noted that challenges to those clauses succeeded in Kentucky, which settled the lawsuit after the 6th Circuit denied its appeal of the injunction in that case, and in North Dakota, which decided not to appeal.

In the Indiana case, Patton said, he is awaiting a ruling on his motion to dismiss for lack of standing. The plaintiffs are Indiana Right to Life and an individual who is not a judge or judicial candidate.

Patton said that he spoke to all of the judges who received a questionnaire and they said that despite their First Amendment right to speak on those issues, they chose not to answer. Indiana Right to Life then asked to depose the judges. The trial judge denied his motion for a protective order.

"This is what judges need to know – the goal is to get them under oath and to ask: Did you contact the ethics

commission and did the commission tell you not to answer? If there were no canons, would you answer?" said Patton. "They are trying to take a right and make an obligation out of it."

In 2002, the Supreme Court in its *White* decision could not have envisioned fallout from its ruling such as judges being deposed, detailed questionnaires being sent by special interest groups and the breadth of the pending legal challenges, said Patton.

"In the *White* opinion, Justice [Antonin] Scalia makes very clear the distinction between the announce clause and the pledge and promise and commit clauses," he said. "It shows that once you get a foot in the door, you try to crack the door more widely open."

And Bopp apparently has a large foot. Next on his list, he said, are First Amendment challenges to state rules prohibiting judicial candidates in nonpartisan competitive and retention elections from identifying their political party preference.

"It's a real good shorthand for giving your general philosophy," said Bopp, who recently filed such a lawsuit in Kentucky. "I think stating your party preference is indistinguishable from announcing your views."

Terry Carter, *Loaded Questionnaires?*
A.B.A. J. E-REPORT, Sept. 8, 2006 (Vol. 5, Issue 36).[16]

Three Florida Supreme Court justices who are up for retention election this fall recently received a Christian group's questionnaire on issues important to that group, including opposition to abortion and same-sex marriage.

The judges, through the court spokesman in a letter dated Aug. 22, declined to answer, noting that doing so "could be interpreted as a position on an issue that may come before the judge."

Then came the lawsuit, filed in federal court six days later by the Florida Family Policy Council. It claims sections of the state Code of Judicial Conduct are unconstitutional insofar as they are being used to prohibit judicial candidates from expressing their views on important issues. *Florida Family Policy Council v. Freeman*, No. 4:06CR395 (N.D. Fla.).

Critics on both sides of the increasingly hot issue of questionnaires posed to judicial candidates say Florida fell into a trap that has already ensnared other states in litigation brought by similar interest groups. And the interest groups have been winning more than their share of the cases.

The response from the Florida justices came shortly after the Judicial Ethics Advisory Committee, an arm of

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[16] This article is available at www.abanet.org/journal/ereport/s8canon.html, and it includes links to the Florida Family Planning Council's 2006 Statewide Judicial Candidate Questionnaire as well as to the National Center for State Courts National Ad Hoc Advisory Committee on Judicial Campaign Oversight's Advice Letter, dated Aug. 28, 2006.

the state supreme court, issued an opinion. "Candidates are not per se barred from responding to questionnaires which deal with disputed legal and political issues," the committee wrote, but "must not furnish answers that appear to bind the candidate if such issues arise once the candidate has assumed judicial office." Opinion No. 2006-18 (Aug. 7).

The opinion went on to state that "the dispositive question is still whether the individual 'beholder's' fear of partiality is reasonable, reasonableness being determined by a neutral and objective standard."

"That opinion could have been done a lot better," says Roy A. Schotland, a professor at the Georgetown University Law Center and a longtime observer of judicial elections. "And though it doesn't seem intended, it invited this lawsuit."

The evolving cat-and-mouse game with judicial election questionnaires has gotten faster and finer as it moves into the corners – most significantly since the 2000 elections. Many questionnaires now ask candidates who decline to answer to check blocks indicating why, and one choice concerns the possibility of violating ethical canons. The battle is primarily between concern for the appearance of impartiality in the judiciary and a competing concern for voters to be able to make meaningful choices among judicial candidates.

James Bopp Jr., a Terre Haute, Ind., lawyer who vets questionnaires for a number of interest groups, says he expects judges to be impartial and rule solely according to the law. But, he says, judicial candidates should be permitted to express their views on various issues.

Critics counter that such questioning is an attempt to determine how a judge or would-be judge would rule in certain matters, and would undermine public confidence in the judiciary.

The mostly conservative, mostly Christian-based interest groups pressing the questionnaires are forcing state judiciaries to deal with the ramifications of the U.S. Supreme Court's ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). It held that the "announce clause" in Minnesota's judicial canons, which prohibited judicial candidates from announcing their views on disputed legal or political issues, violated their First Amendment rights.

The ABA House of Delegates in 2003 amended the Model Code of Judicial Conduct to comply with *White*, removing the so-called announce clause at the heart of that ruling. At the same time, the ABA launched a commission to work on the first sweeping revisions of the canons since 1990.

In the interim, the temporary fix in 2003 has not stopped repeated litigation over the impact of the canons on judicial elections. The commission's final draft report, which will go to the ABA House of Delegates at the mid-year meeting, is expected to be released in about two weeks.

The Supreme Court in *White* did not rule on a clause in some judicial canons that bars judicial candidates from making statements that commit or appear to commit them with respect to controversies that may come to the courts. Nor did the high court rule on a prohibition against "pledges or promises of conduct in office other than the

faithful and impartial performance of the duties of the office."

But some courts have taken the *White* opinion further to say those provisions also violate First Amendment rights, such as in a North Dakota case, *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d. 1021 (2005). Bopp, the lawyer behind *Minnesota v. White* [sic.], has helped carry the fight over judicial campaign statements into several state lawsuits.

Hoping to keep judicial elections on the high road, the National Center for State Courts recently sent an advisory memorandum to state chief justices on how they might deal with the proliferation of questionnaires.

The memorandum, dated the same day Bopp filed suit in Florida but in the works for two years, offered five guidelines. Perhaps the most important one says: "Never use a judicial canon to justify a decision not to respond. Since *White*, interest groups have successfully litigated (in four states, with two more pending) to strike down canons that are read as prohibiting responses to their questionnaire, with recovery of costs and fees from the states."

"Sometimes when the Supreme Court rules, people accept the ruling and move on, and sometimes they have to be dragged kicking and screaming," says Ronald A. Rotunda, a professor at the George Mason School of Law. He has written extensively on professional responsibility and judicial ethics. "You can't take the politics out of politics, and once you decide you're going to have political elections for judges, this isn't excess baggage. It goes with territory."

The most recent kicks and screams, before Florida, came in Kansas. A federal judge in July ruled that, under *White*, opinions by the state's ethics advisory panel have led to unconstitutional prohibitions on campaign speech by candidates for the bench. The July 19 ruling is on appeal. *Kansas Judicial Watch v. Stout*, No. 06-4056-JAR (D. Kan.).

Bopp, who also handled the Kansas matter, says that case and others indicate that "what's really going on here is candidates are afraid to answer the questionnaires because of the canons. I'm shocked that the National Center for State Courts, whose purported mission is to help maintain the integrity of the judiciary, is telling them to lie about it and say that's not the reason."

Not so, says Schotland, who is a member of the NCSC's National Ad Hoc Advisory Committee on Judicial Campaign Oversight, which sent the advisory memorandum to state chief justices.

"Bopp is in denial that judges and candidates are lawyers who are professionals and have views of the role of a judge that differ from his, and the rule of law depends on their protecting that view," Schotland says.

The NCSC advice on how candidates should respond to questionnaires states: "There is no simple right answer on how to respond. This is true because of variations in local circumstances and candidates' own preferences. Judicial candidates should research the law in their jurisdiction, consult with local judicial campaign committees, and definitely confer with other candidates."

In the rest of its memorandum, the NCSC advises that judges should not be rushed to respond; not use

preprinted answers supplied on the questionnaire, but instead respond by letter; and distinguish "general-interest, non-advocacy groups from special interest advocacy groups," yet be consistent in all responses.

Ohio State Bar Association E-Mail to Members,
Dated Aug. 2, 2006

From: bounce-announcement2-2315930@lists.ohiobar.org [mailto:bounce-announcement2-2315930@lists.ohiobar.org] On Behalf Of osba@ohiobar.org
Sent: Wednesday, August 02, 2006 1:17 PM
To: announcement2@lists.ohiobar.org
Subject: OSBA "Appointive Elective" System Survey

Dear Member of the Ohio State Bar Association:

Our most recent elections for the Ohio Supreme Court, like those in several other states, have involved the expenditure of millions of dollars, more often than not from independent third-party committees. For several years, Ohio was regarded as the "poster child" for much that is wrong in judicial elections, primarily the influence of money in the selection of judges for our highest court. Polls and surveys in Ohio note that over 80% of our citizens believe that financial contributions (money) influence judicial decision-making. Even more alarming are national polls showing that over 30% of judges share this opinion. The result is a serious erosion of public trust and confidence in the judiciary that causes our citizens to question whether their courts can be fair and impartial.

One idea that has been strongly advanced over the past several decades is an "appointive-elective" system for selection of Justices of the Ohio Supreme Court. An "appointive-elective" system provides for appointment of judges by the Governor from a list of recommended candidates compiled by a bipartisan nominating commission comprised of lawyers and non-lawyers. Such a commission can be constituted in a variety of ways, with appointments

by the Governor alone or through designated appointing authorities, including elected office-holders, bar associations and citizen groups. The objective is to have a diverse group of citizens reviewing the background, experience and qualifications of an expanded pool of applicants. After his or her initial appointment, a judge would periodically appear on the ballot to face the electorate in a retention election, thus being ultimately accountable to the public.

The subject of judicial selection has been a controversial issue in Ohio for many years. The Ohio State Bar Association has traditionally been involved in this issue in a variety of ways. Your OSBA Board of Governors is interested in your thoughts on this subject and, in order to gauge the current sense of our members, we respectfully ask you to take a moment and fill out the following survey.

Click here to take the survey: http://www.zoomerang.com/survey.zgi?p=WEB225JHGDEK2Z

Thank you for your assistance.

John S. Stith, OSBA President
&
Robert F. Ware, OSBA President-Elect

Conference of Chief Justices,
Policy Statements & Resolutions, Resolution 7
in Support of Action to Improve Judicial Selection
and Improve Public Confidence in the Judiciary
(adopted as proposed by the CCJ Task Force
on Politics and Judicial Elections at the
58th Annual Meeting on Aug. 2, 2006)[17]

WHEREAS, the Conference of Chief Justices co-sponsored a National Symposium on Judicial Speech Post-*White*, held in February 2005 and attended by justices, judges and others from 38 states; and WHEREAS, the Symposium participants prepared a *Call To Action/2005* to reflect developments since the Summit on Improving Judicial Selection issued its *Call To Action* in December, 2000, and to urge the Conference of Chief Justices to take the following steps:

- To issue a public declaration regarding the unique nature of judicial elections;
- To make recommendations on three key steps to protect and promote public confidence in the courts:
    1. Develop programs of outreach by judges and lawyers to help the public understand what judges do and particularly how their jobs differ from the jobs of other elected officials;
    2. Enhance efforts that seek to promote a culture of judicial elections so that the public and candidates understand the importance of having judicial elections

[17] This resolution is available at http://ccj.ncsc.dni.us/JudicialSelectionResolutions/resol7JudicialSelection.html.

conducted in ways that protect the reality and appearance of open-mindedness and fairness;

3. Identify measures that will attract and retain on the bench people who will be quality judges, including encouraging states to establish special commissions to review judges' pay and make changes if warranted.

- To review and take action on the 20 recommendations put forward in the original *Call To Action*, adjusted to respond to events since 2000;

NOW, THEREFORE, BE IT RESOLVED, that the Conference assigns the CCJ Task Force on Politics and Judicial Elections the responsibility of drafting an action plan to implement the above steps.

Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*
LEGAL TIMES, Aug. 21, 2006[18]

The nation's state chief justices are launching a campaign to remind voters of what used to be obvious: Judicial elections are different from those for other offices.

Voicing "grave concern" over increasingly partisan and costly campaigns, the Conference of Chief Justices – representing the top jurists in all 50 states, the District of Columbia, and U.S. territories – voted Aug. 2 on measures to emphasize the "unique nature" of judicial elections. At least some of the judges in 39 states are elected.

"It's the money, it's the judicial questionnaires, it's a whole constellation of things happening now that don't advance the public's confidence in the courts," says Indiana Supreme Court Chief Justice Randall Shepard, outgoing chairman of the conference, who hosted the chief justices' meeting in Indianapolis. "We need to get information to bar associations and judges groups about what to do when the fire alarm goes off, or before the alarm goes off, in an election."

The chief justices also targeted low judicial salaries, which may be discouraging quality candidates from running. New data indicate that state judges' salary increases are lagging behind those of other state employees as well as private sector lawyers.

Though concern has been building for years about the increase in campaign spending and partisanship in what

[18] This article is available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1156164646626.

used to be sedate judicial campaigns, the main impetus for the latest effort by the chief justices is the fallout from a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*.

That ruling struck down, on First Amendment grounds, a Minnesota canon of judicial ethics that barred candidates from announcing their views on disputed legal or political issues.

Several lower federal courts have responded to the decision by striking down other state canons and rules aimed at keeping judicial candidates from making campaign promises and partisan statements that may compromise the substance and appearance of impartiality once they are elected.

On July 19, for example, Kansas Federal District Judge Julie Robinson cited the *White* ruling when she enjoined enforcement of that state's canon barring candidates from making promises about positions they will take on the bench. A judicial-watch organization sued after a state agency said judicial candidates should not respond to the group's questionnaire about issues including same-sex marriage and abortion rights.

"Most of the rulings so far run out ahead of the Supreme Court's decision, by and large in ways that lead to behavior that is not good for the judicial system," says Shepard, who fears the weakening of judicial canons will only feed the cynical view that judges are like candidates for other offices who can be pressured by interest groups and big donors. "No good comes from fostering judicial food fights at the ballot box."

The *White* de[illegible]ion's main effect has been to encourage interest grou[illegible] ply judicial candidates with questionnaires demanding that they take positions on controversial issues, says Georgetown University Law Center professor Roy Schotland, who studies judicial elections and worked with the chief justices on the issue. "The situation is bad, getting worse, with federal judges leading the way downhill."

At a symposium on the impact of the *White* decision at the National Judicial College in Reno, Nev., last year, participants called on the chief justices to move aggressively to improve public understanding of courts and the need for open-minded judges, as well as to change the "culture" of judicial elections.

A "call to action" endorsed by the participants at the Reno conference urged, "Very high priority must be given to reducing the aspects of judicial elections that jeopardize public confidence in our courts – our state courts directly, but unquestionably all our courts."

Interview by Bill Moyers with Justices Kennedy & Breyer on *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999).[19]

Bill Moyers: Last year in Philadelphia, at the American Bar Association, both of you were quite outspoken on this issue of judicial independence and the threat of financial contributions and political pressure. Why did you sound the alarm?

Justice Kennedy: We have a special point of view to present. The judiciary as an institution is faced with a new threat. Democracy is something that you must learn each generation. It has to be taught. And we must have a national civics lesson about judicial independence.

Justice Breyer: It's important to every American that the law protect his or her basic liberty. We developed a system of protecting human liberty such that judges and independent judges are a necessary part of that protection. I think it's important that Americans understand that. And if that independence is seriously eroded, it will be hard to protect those things that this country was based upon.

Bill Moyers: You said in Philadelphia, Justice Kennedy, that the law makes a promise. The promise is neutrality. What do you mean by neutrality?

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[19] The complete television transcript is available at www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html; the transcript of just the interview with Justices Kennedy & Breyer is available at www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html; and a video of the Justices' interview is available at http://media.pbs.org/ramgen/wgbh/pages/frontline/1807/justices.rm.

Justice Kennedy: You have to remember that we live in a constitutional democracy, not a democracy where the voice of the people each week, each year, has complete effect. We have certain constitutional principles that extend over time. Judges must be neutral in order to protect those principles . . . There's a rule of law, [and it] three parts. One: the government is bound by the law. Two: all people are treated equally. And three: there are certain enduring human rights that must be protected. There must be both the perception and the reality that in defending these values, the judge is not affected by improper influences or improper restraints. That's neutrality.

Bill Moyers: And yet, as you said in Philadelphia, judges don't emerge in a vacuum. You all are products in a way of the political process – not individually, but it's the process that gets you to where you are, even if appointed. Is neutrality really possible?

Justice Breyer: I think, Yes, it is. Judges are appointed often through the political process. At least there's a political input, but when you put on the robe, at that point the politics is over. And, at that point, a judge must think through each case with the total neutrality that you mentioned . . . All anyone has to ask himself is, Suppose I were on trial? Suppose somebody accused me. Would I want to be judged by whether or not I was popular? Wouldn't I want to be judged on what was true as opposed to what might be popular? Think of Socrates: 500 Athenians voted to condemn him. We have a different system. And our system is based upon what you described as neutrality and independence.

Justice Kennedy: Our system presumes that there are certain principles that are more important than the

temper of the times. And you must have a judge who is detached, who is independent, who is fair, who is committed only to those principles, and not public pressures of other sort. That's the meaning of neutrality.

Justice Breyer: I'll give you an example if you want because I often get the question, "Well didn't you go through a confirmation process?" And in that confirmation process, I sat for 17 hours in front of a senate judiciary committee. I mean maybe 17 hours and 30 minutes, who's counting? But they asked me questions and I had to answer. And it was on television . . . If they were listening and they decided they didn't like what they saw they might communicate with their elected representatives. And perhaps I wouldn't have been confirmed. Well what did I think about that? I thought that that was an effort to inject a popular element, a democratic element into the selection of a person who, once he is selected and confirmed, is beyond electoral control. Now why do we have such a system? Because, on the one hand, people, when they think about it, want judges to be independent. Nobody wants a judge to be subject to the political whim of the moment. At the same time, we do live in a democracy. And for that reason I think it is appropriate to have some element of public control. And that element of public control in the federal system is introduced through the confirmation process and the selection process. But once the person is selected, at that point that person is independent.

Bill Moyers: Do you think that people who make contributions to judicial elections want those judges to be independent?

Justice Breyer: I don't know. I imagine some may, some may not. I don't know. It's a question of degree. You can have many different selection systems, but the bottom line has to be a system that, once the judge takes office that judge will feel that he or she is to decide the case without reference to the popular thing or the popular will of the moment.

Bill Moyers: Go back to the confirmation example, for a moment. Do you think the senators wanted you to be independent?

Justice Kennedy: Were they asking questions of Justice Breyer and of me and of our colleagues in order to determine how they would vote on a particular issue? Or were they asking instead to probe the temperament, the judicial qualities, the scholarship of the nominee? I hope it's the latter.

Justice Breyer: It is the latter, it is the latter . . . They're selecting the person because they think that person will be all right, and they believe and want, once that person is selected, that [the judge] should be independent. I mean, years ago, we heard Russian judges – I did once at a conference – and they were talking about what's called "telephone justice." And telephone justice is where the party boss calls you up on the telephone and tells you how to decide the case. So they said, Well, don't you have that in the United States? Now, really don't you? So I said, No. And I looked around and I said, Well I know you're thinking that even if we did, I would say no. They said, That's right. And I said, Well how can I explain it? It's just that no one in the United States wants that kind of system and it would be outrageous and beyond belief that someone would call up on the phone.

Bill Moyers: The concern that each of you expressed last year in Philadelphia was in particular about campaign contributions to judicial races. Why do you see that as a threat to independence and neutrality?

Justice Kennedy: Well, in part, it's because the campaign process itself does not easily adapt to judicial selection. Democracy is raucous, hurly-burly, rough-and-tumble. This is a difficult world for a jurist, a scholarly, detached neutral person to operate within. So, the whole problem of judicial campaigns is . . . difficult for us to confront. Now, when you add the component of this mad scramble to raise money and to spend money, it becomes even worse for the obvious reason that we're concerned that there will be either the perception or the reality that judicial independence is undermined.

Bill Moyers: Let me just give you some statistics from a poll conducted by the Texas state supreme court and the Texas state bar association, which found that 83% of the public think judges are already unduly influenced by campaign contributions. 79% of the lawyers who appear before the judges think campaign contributions significantly influence courtroom decisions. And almost half of the justices on the court think the same thing. Isn't the verdict in from the people that they cannot trust the judicial system there any more?

Justice Kennedy: This is serious, because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral. And when you have figures like that, the judicial system is in real trouble. And that's why we should have a national conversation about it.

Justice Breyer: I agree completely. Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions. And if that's what people think, I couldn't agree with you more. The balance has tipped too far, and when the balance has tipped too far, that threatens the institution. To threaten the institution is to threaten fair administration of justice and protection of liberty.

Bill Moyers: Our research shows that the contributions to judicial elections around the country are increasing at a faster percentage than contributions to presidential and congressional races. What do you make of that?

Justice Breyer: I think it's a very good idea to try to look into it empirically. As you know the federal judges are not elected. We are selected, but I grew up in California and in San Francisco and there was a system of electing judges. But it was pretty unusual to find an instance where the position was contested let alone find an instance where there was a lot of campaign money.

Bill Moyers: There was a pre-selection process.

Justice Breyer: Well, just that there would be somebody in the office and the voters – it was more or less an understanding in the entire community, as long as that person was doing a good job on the merits, nobody was going to run against him. And the problem is once you get into this campaign business and begin to have a lot of money, then the person on the bench begins to think – what's going to happen if I decide the case this way or that way? Or at least the public sees it that way.

Justice Kennedy: Decades ago there was an old boy network. And like most old boy networks it worked rather well . . . The bar defended its judges. The bar was unified. It was run by the old boy network. Things have changed. They should have changed. We shouldn't have an old boy network. The problem is the bar itself has become fractionated. You have plaintiffs attorneys, you have defense attorneys. So there is no unified bar that will protect a particular judge who has made a courageous decision that's unpopular.

Bill Moyers: We actually talked to a lobbyist in Texas on record, on camera, willing to go on camera to talk about how – it's a lobbyist for the Texas Medical Association who boasted that he had succeeded in reshaping the philosophy of the Texas supreme court through an all-out political campaign and very large donations. They took [control of the court] from the trial lawyers who had been making contributions and had influenced the court to the other side of the, of the aisle. What does that say about the perception of independence?

Justice Breyer: I think it shows that if you have one group of people doing it, you'll get another group of people doing it. And if you have *A* contributing to infect, to affect a court one way, you'll have *B* trying the other way. And you'll have *C* yet a third way and pretty soon you'll have a clash of political interests. Now, that's fine for a legislature. I mean that's one kind of a problem. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits . . . And as I said our liberties are connected with that.

Justice Kennedy: But when you carry over the political dynamic to the election, fair takes on a different

meaning. In the political context fair means somebody that will vote for the unions or for the business. It can't mean that in the judicial context or we're in real trouble . . . To begin with, we have to ask, Is it fair for the electorate to try to shape the philosophy at all, without campaign contributions? Is this a proper function? I am concerned about that. I do not think that we should select judges based on a particular philosophy as opposed to temperament, commitment to judicial neutrality and commitment to other more constant values as to which there is general consensus . . .

Bill Moyers: I was struck by something you said in Philadelphia, last year. You said that it's wrong for attorneys to make contributions to judicial candidates and expect favorable rulings in return. But would a lawyer make a contribution to a judicial campaign without expecting something? That's not human nature to give without expecting something back.

Justice Kennedy: But the law is a profession and lawyers are committed to uphold the constitutional system and the independence of the judiciary. And I adhere to my statement. If an attorney gives money to a judge with the expectation that the judge will rule in his interest or his client's interest, that is corrosive of our institutions. It's corrosive of judicial independence.

Justice Breyer: Once you're in a system where there are contributions being made, it's certainly not the case that everybody expects something back. I mean those people who are interested in good government will certainly contribute in order to make certain there's some counter-balance to those whose interests in good government is less.

Justice Kennedy: You're hypothesizing the neutral eleemosynary donor. I hope they exist.

Justice Breyer: I think they do.

Justice Kennedy: I'm not sure . . .

Bill Moyers: Even at the local level some judicial candidates have to raise $250,000 to win and spend a great deal of time not only raising money but making television commercials, being coached by media advisors to walk into the room and look judicial. Now what does this do to the process?

Justice Breyer: It demeans the process. We all know there are other countries where, for various reasons, the public lacks confidence in the judiciary . . . And where those things have happened, I think there have been bad results for the people who live in the country, not just for the judges, not just for the lawyers, but for the ordinary man and woman who lives in the country. There tends not to be a method of fairly resolving disputes. And that means that it's harder to develop businesses. It's harder to just live an ordinary life in a fair way and it's harder to protect liberty.

Bill Moyers: Have you given any thought to what we could do about this?

Justice Kennedy: First, I hope that there will be enough of a concern by all segments of our community about protecting the independence of the courts that people will seriously consider trying to improve the election climate. That's the first thing. Second, I think the bar association ought to return to its earlier neutral professional attitude. Third, I think other civic groups and the media ought to do the same thing . . . If we could somehow

use elections to educate the public on the meaning of judicial independence, then we could take what is a flaw and turn into a strength, what is a disadvantage and then turn it into advantage.

Justice Breyer: Ultimately, the question of campaign contributions will be decided by the public. We do it in a democracy. Every citizen has to figure out what kind of government he or she wants. The most that we can say is that there is a problem and we hope you'll think about it . . . And we trust that if people do think about it, they'll come to better solutions . . .

Bill Moyers: I respect your respect for the public, but I have to say that in states like Louisiana and Texas, where we've been reporting, the public stake in, and awareness of, and involvement in, judicial campaigns is being submerged to the sheer flood of contributions that are coming in. So that the public is less and less aware of what's happening behind the scenes.

Justice Breyer: Judges can't easily defend themselves. We can speak about the institution, but ultimately the bar is the group that both is in touch with the public on the one hand and understands the judicial institution on the other. And I had hoped that the bar associations would take the lead and try and think about the problem and educate the public . . .

Justice Kennedy: Most of the contributions that you're talking about are by entities that are interested in the civil law, the economic interests . . . [But] the criminal judge has no basic constituency to support him or her if they are obeying the law and are doing their job in the right way. And so when there's a contested election it then becomes, Who's tougher on crime? And this is very unfortunate

because it distorts the idea of judicial independence. A judge sometimes must release a criminal. He doesn't like it, she doesn't like it, but the law requires it. And the context of an election in which you are "soft on crime" betrays a misunderstanding of the judicial process and a misunderstanding of the constitution.

Justice Breyer: And supposing the person didn't do it? It doesn't help to fight crime to put people in prison who are innocent. And if a judge is going to be criticized for letting off a person and it turns out that person was innocent, that would be a pretty bad criticism. Or suppose the person didn't have a lawyer. Well it's fairly important that everyone have a lawyer and so we have a system that you can't convict a person without a lawyer, even if he's guilty. Well the judge might stand up for that principal, which he has to do under the law. And it would be a pity if because he stood up for the correct constitutional principle or decided that a person was innocent, wouldn't be convicted, that some opponent, through a set of advertisements took his job away. That's the problem.

Bill Moyers: Do you think we're losing qualified people because of this system?

Justice Kennedy: I have no recent studies or empirical basis on which to answer that question . . . We so far, I think, are very lucky. There are some real heroes in the state judicial system, some marvelous judges, who know the law, who love the law, who are serving there for the right reason.

Justice Breyer: I completely agree with Justice Kennedy, and particularly the last comment, because often I used to tell students who come to the court – You'll read in the newspaper about the Supreme Court of the United

States. You will read in the newspaper more often about federal courts, but the law that affects people, the trials that affect human beings are by and large in the state courts. That's the bread and butter of the judicial system. Those are the judges who decide where the child should go in the case of divorce. Those are the judges that deal with 90% of the crime. Those are the judges that deal with a person's house, with a person's car, with everything that means something to an individual family. And they don't get lots of publicity and they don't get a lot of salary either. And life in some of those courts is not so easy for the judges. And the walls may have a few cracks and the telephone may not work, and they may have a hard time getting their case recorded because the word processor – well, they don't have one . . .

Bill Moyers: Do you think that this is a critical moment for examining judicial elections?

Justice Kennedy: A commitment to the constitution is not something that's genetic, it's not inherited, it's not automatic. It has to be taught. And each generation must learn about the constitution and the values of constitutional institutions within the context of their own time, within the environment of their own time. And if we are in an era in which there is a loss of confidence in the judicial system – and, even worse, a misunderstanding of the judicial system – then we must take steps to correct it. I do sense that there is a growing misunderstanding, a growing lack of comprehension, of the necessity of independent judges . . . There must be a rededication to the constitution in every generation. And every generation faces a different challenge. We weren't talking about this 30 years ago, because we didn't have money in elections. Money in elections presents us with a tremendous challenge, a

tremendous problem and we are remiss if we don't at once address it and correct it . . .

Bill Moyers: Well you remind me of what the historian Plutarch said in the Roman Republic: "The abuse of buying and selling votes crept in and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts. And then to the army, and finally the Republic was subjected to the rule of emperors."

Justice Breyer: There are loads of countries that have nice written constitutions like ours. But there aren't loads of countries where they're followed. And the reason that they're followed here is not simply because of the judges. It's because of the Civil War. It's because after 80 years of segregation you had a decision of *Brown v Board* that said people will be treated equally. And then many years before that became real, and gradually over time, 270 million people have learned roughly the importance of following that constitution and following that law. It's complicated. It's called habit. It's called respect for the constitution, and it's called respect for the institution of the judiciary. And that grows slowly. People have to be educated and they have to stick to it. If people lose that respect, an awful lot is lost.